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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 435

CONTINENTAL CASUALTY COMPANY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

REPLY OF CONTINENTAL CASUALTY COMPANY

To

BRIEF OF SOLICITOR GENERAL, IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

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SYLLABI—INDEX

1.

As this case is *sui generis* and *res nova*, we cite no authorities but deny applicability of Solicitor General's authorities, page 7: *South Boston Iron Co. v. U. S.*, 118 U. S. 37; *Bedding Company v. U. S.*, 266 U. S. 491; *Erie Coal Co. v. U. S.*, 266 U. S. 518.

2.

We deny we ever claimed that the Repudiation of Contract by Col. Hodges *discharged* the Continental Casualty Company's *Bond* as stated page 8 of Solicitor's Brief. We admit now this act did not discharge Surety's liability to the United States and that the Bond has always been in effect, and liability for liquidated damages and Government overhead, Statement, this brief, page 11, exists if our contentions as to them are unsound.

3.

Our claim specifically has always been that Lt. Col. J. N. Hodges who signed the contract and administered the work, had full and complete and specific authority under Article IX (a) to notify defaulting contractor "its right to proceed was terminated" thus fixing Surety's liability, but to determine just what that fixed liability was, the United States necessarily had to *exercise its options:*

(a) Take over equipment and complete the work itself, or

(b) Sub-contract the work to ascertain Excess Cost and Damages.

But the United States did neither, waived its options and the Administrative Officer undertook com-

SYLLABI—INDEX—(Continued)

pletion under specific authority "otherwise" by contracting with the Surety at original 8 cents a cubic yard, thus preventing any excess cost or damages to the Government.

When Government prevented performance by Surety by refusing to make monthly progress payments, having waived its options, it was illegal to revive its waived option and contract with Cralan, and the Surety was released from performance and could not be made liable for Cralan's excess costs.

4.

This is the point *res nova,* never decided by any Court or by this High Tribunal.

5.

If Continental Casualty Company is right as to this point this strikes out Cralan excess cost $28,963.72 in Government's Statement (R. 86), page 12, this Brief, and the admitted credit due Surety of $21,268.89 for retained percentages and credits at date of default is more than sufficient to wipe out the $4,600 liquidated damages and Government Area and District Overhead $14,479.87 or total of $19,079.87—and the Surety owes the United States nothing.

"ERRATA"

"In Syllabi 2 "page 11" should be "page 10".

Also in Syllabi 5 "page 12" should read "page 10".

Also on page 9, last paragraph, sentence is "In the first place this case does *not* apply." "*Not*" having been left out."

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May we say, in candor, but with entire respect, that it is our opinion no opposition to this writ can be made unless predicated upon ignoring the fundamentals of the case, the stipulations of agreed facts and on fallacious and unsound conclusions of law.

These fundamentals are:

First

Failure to appreciate that this case is

Sui generis.

There is, as far as we can find, not another case in our jurisprudence like it, hence it is *res nova.*

Second

There is not a single disputed fact, so found by the Court of Appeals.

The *figures* of the Government's claims are not denied.

The surety only denies its liability for the claims propounded.

Third

Nothing is to be decided except *Points of Law.*

Fourth

The case was submitted on a

Stipulation

of *agreed facts* and undisputed correspondence, viz: (Tr. 52)

"It is stipulated and agreed between Counsel for the United States and Counsel for the Continental Casualty Company that this cause shall be tried on the following agreed facts, together with such additional facts and evidence as either party may desire to offer and produce"—(Tr. 52) "but no testimony or evidence" contradictory or inconsistent with the above could be offered.

A

On March 17, 1934, Lt. Col. Hodges, who signed the contract with Grasser Contracting Company, administrative officer, notified the surety by letter (Tr. 59-60) of the bankruptcy and default of the Grasser Company, but *neglected* to enclose copy of his letter to Grasser Company "terminating its right to proceed" with the contract.

He asked Surety if it desired to complete the work "in accordance with the terms of the contract."

March 22, by telegram and letter (Tr. 61 and 62), Surety stated it "desired to complete the work and would proceed provided all necessary steps have been taken to annul Grasser contract."

This proviso was caused by fact, Lt. Col. Hodges did not advise Surety he had only terminated defaulting contractor's right to proceed and sent no copy of his letter to Grasser Company.

Lt. Col. Hodges immediately corrected the misunderstanding by his letter of March 26th (Tr. 63), sending copy of his letter to Grasser of March 17th, and stating "It is the view of this office that this constitutes the only action necessary in the premises."

The Surety by letter, March 28th, accepted this statement and stated they were moving rapidly for completion of the contract. Lt. Col. Hodges acknowledges that the Surety had agreed to complete the work in his letter to Brittmar P. Landry, Receiver, March 31st, 1934, Tr. 66 (d) and again to P. M. Milner, April 3d, 1934 (Tr. 68).

It is rather surprising that the Court of Appeals committed reversible error in holding that there was no agreement between Lt. Col. Hodges and the Surety (see our Brief in Support of Application, pages 15-16) and that the Solicitor General futilely urges same point in his Brief.

B

The contract offered the Surety and accepted, by Art. 16, required Government to make monthly progress payments.

Now what was the legal status that both the Court of Appeals and the Solicitor General unfortunately and erroneously ignored?

Article IX of the contract (R. 274) (see note to opinion Court of Appeals) and (note, page 3 of Solicitor General's Brief). Here is the whole crux of the case. It reads: "the Government may by written notice to the contractor terminate his right to proceed with the work or such part of the work as to which there has been delay." Now here is what the Court of Appeals and the Solicitor General ignore: "In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby."

This article authorizes the Administrative Officer, Lt. Col. J. N. Hodges, who signed the Grasser contract for the Government and terminated contractor's right to proceed—

(a) to take over the work and all equipment and complete itself, or

(b) by contract let out.

But the Government did neither.

By way of minimizing damages the Administrative Officer adopted the authority given him to complete the the contract "otherwise" by offering the Surety the right to complete it at original price of 8 cents a cubic yard with monthly progress payments, which the Surety accepted.

The Solicitor General quotes, *cf. South Boston Iron Co. v. United States*, 118 U. S. 37, as authority that no mutual agreement had been reached.

It seems futile to say the Continental Casualty Company had no agreement to complete the work. The letters of March 26th and March 28th speak for themselves. The decision quoted is absolutely inapt, entirely different, not parallel nor analogous to our agreement.

Analysis of Cited Cases

The offer to construct new boilers, while accepted by the Navy Department, was *conditional* to furnishing drawings and specifications. Before this was done proponent was advised to discontinue. Proponent brought suit for damages. No contract could exist until the drawings and specifications, specifying the work had been furnished, which was never done.

The Supreme Court held rightly that no contract existed—the papers or letters contemplated a further agreement based on drawings and specifications were merely preliminary memo towards preparing contract.

In our case the contract defaulted was in standard form in writing at 8 cents a cubic yard, payable in monthly

progress payments. The letter of Col. Hodges of March 26th was accepted March 28th. Everything was in writing—and nothing left to future negotiation—a complete mutual agreement. Letters formally signed.

Erie Coal & Coke Corporation v. United States, 266 U. S. 518. Case dismissed on demurrer because acceptance of a bid is not final until a contract is entered into.

U. S. Bedding Co. v. United States, 266 U. S. 491. A case not in point. Government requisitioned linters. Owner and Government disputed actual value. Later Government released all requisitions—plaintiff had no cause of action.

In the Alternative

Solicitor General says assuming that a formal proposition in writing signed by the Government's Administrative Officer and formal acceptance in writing and signed by the Continental Company complied with Revised Statutes, Section 3744, still the United States was not bound, and the Solicitor General erroneously says the Government is not bound, ignoring that Article IX of the contract tendered and accepted in writing, authorized the Administrative Officer by express provision (a) either to take over the contract by the Government, take over all equipment and do the work itself, or (b) to sub-contract the work (in either of which cases the Surety would have been bound for excess costs without any defense) or complete the contract "otherwise" which he did by agreement with the Surety.

It is impossible that this was not within the express authority given the Administrative Officer and binding on the Government.

We say with respect, the Court of Appeals erred, this being the crucial point presented to this Court by our petition.

The error of the District Court, affirmed by the Court of Appeals, is erroneously assimilating the action of Lt. Col. J. N. Hodges to cases of "negligence" or "laches" in all of which circumstances the Government is not bound *(Hale County, Texas, v. American Indemnity Co., 63 F. (2d) 275)*. But this act of Lt. Col. J. N. Hodges in refusing to make monthly progress payments was neither "laches" nor "negligence". We challenge the argument on page 6 of Solicitor General's Brief.

The contract unquestionably provided for "monthly progress payments", Art. 16.

To refuse to make the payments was "repudiation" of the "agreement" in writing by the signed letters of March 26, 1934, and March 28, 1934 (R. 61-62-63-64-65), which perfected the contract.

Counsel calls this "an erroneous interpretation" and cites *Mobley v. N. Y. Life Ins. Co.*, 295 U. S. 632. In the first place this case does apply. This was not a Government case. The Court held that the honest belief and refusal of the Life Insurance Company to pay a monthly disability benefit was not a "repudiation" of the policy. To same effect is *N. Y. Life Ins. Co. v. Vigeas*, 293 U. S. 672. The cases have no bearing as cited. The Solicitor

General has missed the entire point of our contention. We stress this point in our

Conclusions.

Here is the Government's itemized claim (R. 86).

The Court will please note that there was due Grasser and the Surety in retained percentages, etc., at date of default $21,268.89.

"(R. 86):

Yardage by second contractor, 1,002,205 @ 10.89 cents		$109,140.12
Cost under original contract, 1,002,205 cubic yards @ 8 cents		80,176.40
		28,963.72
Additional Government cost		14,479.87
		43,443.59
Less: Percentages retained and amounts due contractor at time of default	$21,268.89	
Less: Liquidated damages accrued and uncollected at time of default	4,600.00	16,668.89
Total excess cost to U. S. of completing contract		$ 26,774.70"

The point to be decided and it has never been decided before is:

Upon default of contractor, the Surety's liability is fixed under Art. IX, if

(a) The Government takes over equipment and completes the work itself, or

(b) Sub-contracts the work, or

(c) "Otherwise" agrees with the Surety to complete the work.

Question: Can the Government after waiving its options (a) and (b) and making a valid contract with the Surety (c) "repudiate" its obligation to make "monthly progress payments" ignore this agreement, treat it as never was and go back and avail itself of its waived option (b) sub-contract the work and charge the Surety with the *excess* cost.

Will this Court allow the Government to play fast and loose with an honest surety company anxious to complete its obligation to the Government as it did when it paid material furnishers and laborers $37,470.61 (R. 43-44-45).

If this High Court says no, then the *excess cost* of Cralan, Inc., doing the work after it had to buy the two Bucyrus dredges for $60,000 (R. 98-109) which necessarily added to its cost, is wrongfully charged against the Surety, $28,963.72. To this extent the Surety is perforce released under its Bond—but the Bond is not discharged.

Counsel says we urge that the breach of contract made with the Surety by Lt. Col. J. N. Hodges, *released* the Surety's obligation.

We never made and do not make any such claim. All we claim is that having waived the Government's option (b) and made valid contract with the Surety, Lt. Col. J. N. Hodges could not validly and legally repudiate this contract and hark back or go back to exercising option

waived; hence we are not liable for the Excess Cost under Cralan, Inc., contract $28,963.72.

Pretermitting discussion of the illegality of the $14,479.87 Government Area and District Overhead, the excess Cralan cost is illegal—with $21,268.89 admitted credit (R. 86), the liquidated damages even added to the unconscionable Government overhead, our $21,268.89 credit for retained percentages and credit will defeat any claim of the Government.

Respectfully submitted,

P. M. MILNER,
Attorney for Petitioner.

October 17, 1940.

Five copies sent by registered mail to Solicitor General.

P. M. MILNER.